Whether the legislation suggested would be wise is another question, and for the four main reasons given in the early part of this note we doubt its wisdom seriously, but at least it would not be subject to the objection that it would be unconstitutional.

A close analogy is that of bigamy committed outside the State and cohabitation with the unlawful wife inside the State. It is universally held that statutes purporting to punish *for bigamy* where the bigamous marriage was not contracted within the State or by one of its citizens, but cohabitation within the State has followed, are unconstitutional and void.[37] But this does not take away the State's jurisdiction to punish for the *unlawful cohabitation* within its territory.

And here we get back on solid ground again. By punishing only the *bringing* of stolen goods into this State, or the *having of them in possession,* we punish the only offense committed against its sovereignty, and we leave to the particular sovereignty offended the punishing of the larceny or robbery itself, assisting it, where requested, under the extradition laws or under the comity of nations.

H. F. W.

INTOXICATING LIQUORS—CONSTITUTIONALITY OF PROVISION IN ACT OF 1922 FOR SEARCH WITHOUT WARRANT.—An Act of the General Assembly,[1] approved in March, 1922, provides:

> " * * * all other officers charged with the enforcement of the prohibtion laws of this State * * * without a warrant, may enter freight yards, passenger depots, baggage and storage rooms of any common carrier, and may enter any train, baggage, express, or freight car, and any boat, flying machines of any kind and submarines, automobile, or other conveyance, whether of like kind or not, or any billiard room, pool room or bowling alley, where there is reason to believe that the law relating to ardent spirits is being violated; but nothing in this proviso contained shall be construed to permit a search of * * * any hand bag, suitcase or tunk on any train or passenger steamboat, or the usual and ordinary hand baggage of pedestrians, unless such person be found in the act of violating the provisions of the prohibition laws of the State, but it shall be lawful to inspect and examine any such baggage while same shall be carried or found in any boat, automobile or other vehicle herein named, except a train or passenger boat, without a search warrant."

The Constitution of Virginia provides:[2]

"That general warrants, whereby an officer or messenger may be

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[37] People *v.* Price (1911), 250 Ill. 109, 95 N. E. 68; State *v.* Cutshall (1892), 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130; State *v.* Barnett (1880), 83 N. C. 615.

[1] Acts of Assembly, 1922, pp. 573, 582.

[2] Va. Const. Art. I, § 10.

> commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

It will be observed that the constitutional provision above set out does not in terms forbid search without warrant in any case. It seems well settled that courts have no power to declare an act of the legislature void because it is at variance with what they conceive to be the general intent and spirit of the constitution or the genius of a free people, unless such act is in some way forbidden by the words of the instrument itself.[3] It would seem, however, that this policy is not always rigidly adhered to, as for example, in the famous decisions of Chief Justice Marshall[4] and Justice Nelson,[5] holding that the State and federal governments have no right to interfere with the governmental functions of each other by taxation. But it is likewise well settled that there may be a restriction on the power of the legislature by necessary or reasonable inference from the express terms of the Constitution, on the principle that what is clearly implied is as much a part of the instrument as what is explicitly said. The doctrine is thus succinctly stated by the New York Court:[6]

> "But necessarily in all constitutions or other instruments there are certain propositions which the instruments import, as well as those they expressly and in terms assert. Therefore it is well settled that legislation contravening what the constitution necessarily implies is void equally with the legislation contravening its express commands."

The rule is excellently illustrated by the usual case of a provision forbidding the taking of private property for public use without just compensation, but saying nothing concerning the taking of private property for private use. It is, of course, well established that such a clause, by necessary implication, forbids the taking of private property for private use.[7]

Since the clause of the United States Constitution cognate to this subject has no application to the States,[8] we are concerned only with the section of the Virginia Constitution already set forth, which is the only one therein contained dealing with searches

[3] Forsythe *v.* Hammond (1895), 68 Fed. 774; Commonwealth *v.* Pear (1903), 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935 (affirmed 197 U. S. 11); Gray *v.* McLendon (1910), 134 Ga. 224, 67 S. E. 859. *Contra,* McDonald *v.* Doust (1905), 11 Idaho 14, 81 Pac. 60, 69 L. R. A. 220.

[4] M'Culloch *v.* Maryland (1819), 4 Wheat. 316.

[5] Collector *v.* Day (1870), 11 Wall. 113.

[6] Hopper *v.* Britt (1911), 203 N. Y. 144, 96 N. E. 371, Ann. Cas. 1913B, 172, 37 L. R. A. (N. S.) 825. See People *v.* Albertson (1873), 55 N. Y. 50, 55; State *v.* Kohnke (1903), 109 La. 838, 33 So. 793.

[7] *In re* Albany Street (1834), 11 Wend. (N. Y.) 149, 25 Am. Dec. 618 and note.

[8] Weeks *v.* United States (1914), 232 U. S. 383, Ann. Cas. 1915C, 1177, L. R. A. 1915B, 834.

and seizures. In view of the state of the authorities on this point, it will hardly be contended that the Act of the Assembly in question is invalid because in contravention of the general spirit or tenor of the Constitution. If it is void, then, it must be so because the section now under consideration covers it by implication.

There is strong support, in logic at least, for the proposition that when a constitutional provision forbids search and seizure on general warrants, the restriction is to be construed as extending *a fortiori* to such search and seizure without any warrant. The courts, however, seem unwilling to hold that reasonable search and seizure without warrant, such as were permitted at common law, are inhibited by a constitution unless forced to do so by the language of the instrument.[9] It would appear also, in the instant case, that this reasoning can be refuted by the argument that the Virginia Constitution does not mean to forbid arrest and search without warrant in every instance, but simply to provide that wherever a warrant of any kind is necessary a general warrant is not sufficient. This construction, while justifiable, is certainly the most liberal one of which the section admits. If the inhibition means anything at all, it seems that it must go at least this far. From this it must follow that there are cases in which some kind of a warrant is required; otherwise the restriction would again be meaningless. It is not to be assumed that the framers of the Constitution meant to leave it within the power of the legislature completely to stultify the safeguard here erected by the simple expedient of providing that searches and seizures may be made without warrant at all in any case in which it sees fit to permit this. The question here presented, then, is twofold: *First,* in what cases does our Constitution forbid search and seizure, either on general warrants or without a warrant of any kind? *Second,* does the Act of the Assembly now being considered, fall within the purview of the constitutional prohibition?

Unfortunately, because this section of our Constitution differs from the usual stipulation on this subject in the constitutions of other States, which merely prohibits "unreasonable searches and seizures", there is comparatively little direct aid to be derived from the books in answering these questions. Of course general warrants are expressly forbidden in all cases in Virginia. As to procedure without any warrant at all, it is submitted that this section, by fair construction and necessary implication, reveals and expresses a definite, mandatory policy which extends beyond the bare, naked meaning of the words themselves when the latter are read without regard to the unescapable inferences which must follow therefrom. Briefly summarized, this policy is: To prohibit search and seizure, either with general warrant or without warrant at all, in every case where there is "no *evidence* of a fact committed" or where the offense in question is not fully and definitely identified and "supported by *evidence*"

It is an established principle of constitutional construction that

[9] Commonwealth *v.* Marcum (1909), 135 Ky. 1, 122 S. W. 215; Commonwealth *v.* Phelps (1911), 209 Mass. 396, 95 N. E. 868.

when the meaning of a provision is in doubt, resort may be had, for the purpose of interpretation, to the state of the law anterior to the instrument, the mischief sought to be corrected or guarded against, and the nature of the remedy which is applied for that purpose.[10] At common law, general warrants seem to have been almost universally forbidden although they were sometimes issued in England and the Colonies, while search and seizure without warrant were allowed in only a few specific instances, which have become now well recognized in our system of criminal procedure. A careful reading of this clause of our Constitution must disclose that the mischief which it is designed to prevent is search and seizure on mere suspicion or whim, without evidence of a crime committed or particular identification of the offense charged, thus guaranteeing, to this extent, the rights which were recognized by the common law, and placing them beyond the possibility of legislative infraction. The remedy or preventative which is applied is to inhibit such search and seizure on general warrants, and, it is submitted, by necessary implication to forbid it without any warrant. Then, since a special warrant could not be obtained in such a case, the effect would be to prevent this evil altogether, which is certainly "a consummation devoutly to be wished", and which was undoubtedly what the authors of our Constitution meant to do. What purpose could be subserved by abnegating the power of the legislature to permit or authorize general warrants while leaving the way open for it to escape the effect of this stipulation by providing that no warrant at all shall be necessary in any case where it desires so to declare? Such a construction would make of this section a mere jumble of words, signifying nothing, and would leave it utterly and entirely without efficacy to restrain or hold in check the mischief which is denounced by the language of the clause, and the prevention of which would appear to be clearly the purpose and object of this constitutional mandate. A critical examination of the section will, it is believed, make plain and fully support the conclusion here reached.

If this reasoning be correct thus far, our problem is now narrowed to this: Does the Act of the Assembly in question come under the ban of this interdictory policy of our Constitution?

Reverting to the statute, we find that it authorizes search, without warrant, of certain places "where there is reason to believe that the law relating to ardent spirits is being violated"; and of personal baggage when "carried or found in any boat, automobile or other vehicle herein named, except a train or passenger boat", presumably under the same circumstances as in the first instance. No complaint of any kind is required, much less a complaint under oath or affirmation, nor is it requisite that there be "evidence of a fact committed", or that the offense charged be "particularly described (or identified) and supported by evidence". It is apparently left entirely to the officer making the search to decide when he thinks there is reason to believe that any of the laws relating to ardent spirits are

[10] Rhode Island *v.* Massachusetts (1838), 12 Pet. 657.

being violated, regardless of which law, or of what *particular* offense he thinks is being committed, and to act upon his belief or suspicion without "evidence of a fact committed", such as is required in other cases. The "reason to believe" would thus appear to be left solely to the judgment, suspicion, or whim of the officer. Can it be said that this does not impinge upon our constitutional inhibition of search and seizure?

It cannot be maintained that if this statute is void, then search and seizure without warrant, such as were permitted at common law, are also forbidden, because in the instances in which such action was allowed at common law it was necessary that there be evidence of and certainty as to the perpetration of the offense, either through its being committed in the presence of the officer (or private person in certain cases), or in case of felony, because of other reasonable grounds for belief, the officer being responsible for the sufficiency of the evidence upon which he acted. Such practice would not be enjoined by the policy of our Constitution. The basis of this rule of the common law was either the fact that all the evidence and identification required would exist where the offense was committed in the presence of the person making the arrest, or, where a felony was involved, the necessity for prompt action, provided there was reasonable ground for such action. Neither of these reasons is required to exist in the case of the procedure authorized by the statute under consideration. G. W. C.

CHANGES IN THE STATUTORY LAW OF CORPORATIONS MADE BY THE LAST LEGISLATURE.*—V. C. 1919, § 3781, amended by Acts of Assembly, 1922, p. 626.—The act as amended presents among others one radical change in the law concerning the decrease of actually issued and outstanding stock, viz.: *the moment at which the corporation has the right to effect such decrease.* The act in its former state declared the right complete when a certified copy of the proceedings relating to the decrease was recorded in the office of the secretary of the Commonwealth with the consent of the Corporation Commission, subject to the provisions of § 167 of the Constitution. Notice of such decrease was then required to be published in the appropriate newspaper within fifteen days therefrom. The statute in its present form makes the power of the corporation to execute the plan for the decrease *contingent upon the completion of the publication* at least once a week for three successive weeks, which publication must commence within *thirty* days after the filing of the certificate with the secretary of the Commonwealth. Not until after such publication can the decrease legally be effected.

Formerly a copy of the certified copy of the proceedings had to be so published. The amended act requires merely a *written state-*

*Continued from the November issue, p. 74.